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Nos. 85-93, 85-428

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

WILLIAM C. FRIDAY, *et al.*

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS BAZEMORE, *et al.*

BEST AVAILABLE COPY

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On Petitions for Writ of Certiorari
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REPLY BRIEF FOR PETITIONERS BAZEMORE, ET AL.

Petitioners P. E. Bazemore, et al., submit this reply brief in response to the petition for writ of certiorari filed by the United States:

(1) Ten months ago the Solicitor General advised this Court that the conflicting views of the circuit courts regarding the use of statistical evidence was an important problem warranting review by this Court. Petition for Writ of Certiorari, Smith v. Segar, No. 84-1200. The Solicitor argued in Smith that the District of Columbia's method of evaluating statistical evidence involved "a significantly different approach in evaluating multiple regression analysis" than the Fourth Circuit decision in the instant case. (Id., 23). The Solicitor asserted the conflicting Fourth Circuit and District of Columbia Circuit practices were both unsound, characterizing the latter as a violation of standards established by several decisions of this Court.[1]

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[1] The Solicitor argued that the decision in Smith was in conflict with Mayor of Philadelphia v. Educational Equity League,

In his January 1985 petition in Smith the Solicitor read the Fourth Circuit opinion in this case, as do we, to require a plaintiff to include in any statistical analysis any variable that could possibly explain away racial disparities. In Bazemore, the Solicitor argued, there were

> nine independent variables that the court [of appeals] believed should have been but w[ere] not included in the multiple regression analysis included in that case.... We believe that the Bazemore court went too far...; our position is not that plaintiffs' multiple regression analysis must include any qualification that the employer at some point in the litigation asserts as necessary for the position at issue. (Petition, pp. 24-25).

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415 U.S. 605 (1974), Connecticut v. Teal, 457 U.S. 440 (1982), and City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Petition, pp. 22-23.

The Solicitor argued in Smith that a wage comparison of blacks and whites in the same job need not consider any other factors unless the employer utilized some clearly established standard to set different salaries for employees doing the same work.

In the instant case the Solicitor appears to embrace the fourth circuit doctrine he earlier repudiated, now asserting that a wage comparison of blacks and whites in the same job is of no evidentiary significance unless that analysis includes all "factors that normally would be expected to account for salary differentials." (Petition, p. 9). Like the court below, the Solicitor sees no need for a defendant to offer any evidence that these factors were actually utilized in setting salaries, or to demonstrate that including those variables would actually affect proven disparities

in the salaries of blacks and whites. On this view, a court should reject statistical evidence whenever that court, or an employer, can hypothesize any "reasonable" factor that might have affected the salaries in dispute. (Id, 19-20). The Solicitor in January of this year regarded that doctrine as both incorrect and in conflict with other appellate decisions, and we concur with his original view of the matter.

(2) The Solicitor urges that the fourth circuit was correct in holding that Title VII permits an employer to avoid legal responsibility for employment decisions by delegating those decisions to a third party. (Petition 20-21). The Solicitor does not dispute the obvious importance of this issue, but insists that this Court resolved that very question in General Building Contractors Ass'n. v. Pennsylvania, 458 U.S. 375 (1982).

General Building Contractors, of course, was a section 1981 case, and the decision there turned on the fact that section 1981, unlike Title VII, requires proof of discriminatory intent.

The Solicitor asserts General Building Contractors is also a definitive interpretation of Title VII because that decision cited a Title VII case, Furnco Construction Corp. v. Waters, 438 U.S. 567, 577-78 (1978). The passage from Furnco referred to in General Building Contractors, however, has nothing to do with whether an employer can delegate away its Title VII obligations.[2] The signal preceding the citation to Furnco is "Cf.", which indicates that the cited material

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[2] "Title VII ... does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." 438 U.S. at 577-78.

does not contain the same holding as the General Building Contractors opinion in which it was cited.[3]

(3) The applicable regulations of the United States Department of Agriculture require a state such as North Carolina which established its 4-H club system on a de jure segregated basis to "take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. § 15.3(b)(6)(i). There is no dispute that respondents have never taken, and do not intend to take, such action, and thus remain in violation of that regulation. The Solicitor General, as attorney for the Secretary of Agriculture, evidently has no interest in enforcing the Department's regulations. We do, and the

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[3] Cf. indicates that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare'." A Uniform System of Citation, 9 (13th ed. 1981).

parties to enforce such Title VI regulations was clearly established by Guardians Association v. Civil Service Commission, ____ U.S. ____, 77 L.Ed.2d 866, 103 S.Ct. 3221 (1983).

(4) The Solicitor suggests that it does not matter whether the denial of class certification was erroneous, since the government intervened in 1972 seeking the same relief requested in the private class action. (Petition, p. 22). Elsewhere in his petition, however, the Solicitor abandons the salary claims of all black employees hired after 1965 (id., pp. 19-20), the promotion claims of all black employees denied positions as county chairmen (id., pp. 20-21), and the claims of black employees who object to serving racially segregated 4-H and Extension Homemaker Clubs. (Id., pp. 21-22). The certification issue may have seemed of little practical importance while the

Department of Justice was still championing each of these claims, but the Solicitor's decision to abandon those claims makes the availability of certification of vital importance. If the Court grants certiorari on questions 2, 3, or 4, it should grant certiorari on question 5 as well, in order to assure that the interests of putative class members will continue to be fully represented and enforced.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the fourth circuit.

Respectfully submitted,

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